

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

To Be Argued By

DANIEL J. KORNSTEIN

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UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

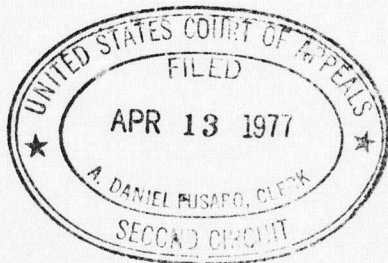
DON WILSON, et al.,

Defendants-Appellants.

Appeal from a Judgment of the United States
District Court for the Southern District of
New York

BRIEF OF DEFENDANT-APPELLANT

DON WILSON



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Appellee, : Docket Number 77-1085
vs. :
DON WILSON, et al., :
Defendants-Appellants :
----- x

BRIEF OF DEFENDANT-APPELLANT
DON WILSON

This is an appeal by defendant-appellant Don Wilson from a judgment of the District Court for the Southern District of New York (Owen, D.J.) convicting him of conspiracy to violate the federal narcotics laws and of possession of cocaine.

Issues Presented*

1. Whether the mass trial of twenty-two (22) defendants, and the District Court's denial of severance, deprived Wilson of due process of law, in light of the protracted length of trial, the number of defendants, and the prejudicial spillover of substantial evidence admitted as to individual defendants subject to limiting instructions.

2. Whether the District Court's advance ruling refusing to permit psychiatric evidence regarding the government's main witness against Wilson constituted an abuse of discretion.

3. Whether the denial of funds to aid in the psychiatric analysis of the government's chief witness against Wilson, an indigent, deprived Wilson of equal protection of the laws.

* To avoid presenting unnecessarily duplicative papers to the Court, Wilson joins in those issues raised by other appellants insofar as they may be applicable to Wilson. Fed.R.App.P. 28(i).

Statement of the case

Don Wilson is an indigent. Too poor to pay for a lawyer of his own choice, he has been represented at every stage of these proceedings by assigned counsel.*

This appeal is from Wilson's conviction on one count of conspiring to violate the federal narcotics laws and on one count of possessing cocaine. After a three-month trial with twenty-one (21) co-defendants, Wilson was convicted by a jury in November 1976. On January 21, 1977, Judge Owen sentenced Wilson on each count to eight years imprisonment, each one to be followed by three years' special probation, no fine, each sentence to be served concurrently.

The Dragnet Indictment

Trawling in what it must have perceived as a sea of narcotics dealing, the government produced the indictment in this case on April 4, 1976. In the indictment, the government cast wide its net, naming thirty-three (33) individuals as defendants and others as co-conspirators but not defendants. The defendants were charged in 30 counts.

* In February 1977, Wilson was assigned counsel for this appeal pursuant to the Criminal Justice Act, 18 U.S.C. §3006A.

Count 1 is the expected and by now almost obligatory conspiracy count. Count 1 accuses all the defendants of conspiring to violate the federal narcotics laws by distributing or possessing with intent to distribute either heroin or cocaine, or both, in violation of 21 U.S.C. §§173, 174, 812, 841(a)(1), 841(b)(1)(A), 951, 952, 960. This alleged conspiracy is said by the government to have extended at least from January 1, 1968 until the date of the indictment, April 5, 1976.

Of the 29 other counts, only one accuses Wilson of wrongdoing. In Count 15, Wilson is accused of possessing cocaine. Aside from Counts 1 and 15, no other count in the indictment refers to Wilson.

In terms of the indictment alone, then, Wilson's role in the enterprise was rather limited and attenuated. Wilson is not accused of being a kingpin, or a hub of any conspiracy. Unlike some of the other defendants, Wilson was not named in nor was he convicted of several counts. Nor does Wilson have any history of criminal conduct; he has no prior criminal record. In short, Wilson was not a big fish. He was a little fish swept up by the government trawler.

The Lengthy Trial

Despite his minor role, Wilson had to sit through the entire trial of this massive conspiracy prosecution, a trial that lasted some 13 weeks and took up some 9500

pages of transcript. During most of those weeks, there was no mention at all of Wilson's participation or involvement, although there was considerable evidence regarding narcotics transactions involving other defendants.

Considering the scope and objects of this prosecution, the case against Wilson was paltry. In its worst light, the testimony of government witnesses Jack Brown and his son-in-law Michael Parker (both of whom were unindicted coconspirators) could be interpreted as follows: In 1971, Wilson was financing "Big Al" in modest narcotics transactions. In 1972, Wilson started buying cocaine from Jack Brown in kilogram quantities. In 1974, Wilson ^{purchased} ~~sold~~ a kilogram of cocaine when he went down to Florida to see Brown. In 1975, Wilson wrote inculpatory letters to Brown.

Unlike other defendants, Wilson never had anything to do with heroin. Nor was he ever accused of being an organizer or manager. Yet he nonetheless had to sit through weeks of such testimony, the bad effects of which inevitably rubbed off on him. Wilson was wrongly tarred with the same brush that touched core conspirators.

Severance

Virtually every defendant moved pretrial for severance of the indictment, urging the District Court either to subdivide the indictment into smaller, more manageable sub-groups or to exercise its supervisory power by requiring that the government make such an election.

Given the enormous number of defendants involved,

the eight-year time span of the indictment and the geographic diversity of the defendants and coconspirators, defendants proposed that consonant with United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir.1974), irrespective of whether the indictment charged single or multiple conspiracies, if in view of the sheer size of the indictment and number of defendants, the charged acts could be more reasonably viewed as two or more conspiracies, over-riding principles of due process and efficient judicial administration strongly suggest that such massive prosecutions be subdivided to more manageable proportions.

Moreover, in light of the fact that two defendants, Moten and Juan Antonio Alvarez, residing in New York and Florida respectively, were charged in two separate counts with having been managerial organizers and supervisors of the narcotics operations (21 U.S.C § 848), the inference was compelling that separate organizational and conspiratorial networks were improperly aggregated by the government under the rubric of single conspiracy, where, in fact, a multiplicity of organizations realistically suggested themselves.

Accordingly, in moving for pretrial severance, defendants argued that there were compelling indicia that the acts charged should more reasonably have been viewed as two or more conspiracies. Besides the thirty-three defendants named in the indictment, the Government's Bill of Particulars named an additional seventeen persons, thus increasing the

number of alleged criminal participants the jury would have to remember and distinguish to fifty, not including the usual number of non-criminal individuals expected to be involved and whom the Government would be expected to call to testify.

Moreover, defendants pointed to the fact that, besides those living in New York and its environs, six defendants lived in Florida (Juan Antonio Alvarez, Angel Rodriguez, Jose Luis Suieder and Nelson Alvarez, Eduardo Yaujar, Lazaro Yaugar), six in the Washington, D.C. area (Joseph Sampon, Lois Sampson, William Hightower, Sidney Foster, Anne Reynolds, Albert Lee Jones), three in Chicago (Yvonne Schennault, Donald O'Dood and Al Williams) and one in South Carolina (Don Wilson).

Furthermore, the events charged in the indictment which span a period of more than seven years, took place in many of these cities. Similarly, it was suggested to the District court that many other substantive offenses were not charged in the indictment presumably because venue properly would not lie (see overt acts 36 through 46).

Indeed, as the defendants initially asserted and the subsequent trial demonstrated, the crux of the government's case centered around the activities and testimony of unindicted coconspirator Jack Brown, the ubiquitous wholesaler and middleman who was the central figure and hub from whom the remainder of the conspirators and defendants radiated, either as suppliers or as purchasers.

According to the indictment, Brown dealt with at least three different groups of suppliers for both heroin and cocaine (J. Alvarez and A. Rodriguez [Florida] allegedly supplied cocaine; Intersimone [New York] allegedly supplied heroin; Copra, Guarine, Della Cava allegedly supplied heroin). These latter three were the only defendants to be severed and, at the time of indictment, were all incarcerated for their conviction in United States v. Capra, 501 F. 2d 267 (2d Cir. 1974).

Moreover, as was brought to the District Court's attention, based upon the pleadings in this case and the record in the related case of United States v. Capra, supra, none of these various discrete groups even knew members of the other groups, much less dealt with each other, their only connection being Brown as their common customer or supplier. The pleadings also suggested that many of the customers, based as they were in different cities, also could not have known each other.

Besides the obvious divisibility of defendants into two or three conspiratorial groups, all defendants suggested to the District Court that severance of the defendants along geographic lines would be not merely an appropriate division of prosecutorial labor, but would correspond, as well, to the relatively easily separable transactions about the various groups of alleged conspirators, irrespective of whether these obviously divisible conspiratorial subgroups

be deemed part of one massive conspiracy or several.

Accordingly, all defendants moved that the indictment be severed into few discrete groups: New York, Floirda, Chicago and Washington. Of these four easily separable subgroups, the only common thread or personage to run through them all was coconspirator Jack Brown.

By order dated June 24, 1976, the District Court denied all defendant's severance motions, with the exceptions of Capra, Buarino, and Della Cava. Characterizing the motion as requiring a pretrial assessment in an area that has caused much discussion even after trial, the Court rejected defendants' argument that irrespective of whether single or multiple conspiracies were charged, the joint trial of such a massive indictment would subject defendants to run the substantial risk of prejudicial spillover from testimony and evidence relating to tangentially-related codefendants or coconspirators. Accordingly, twenty-two defendants were forced to trial in the same proceeding.

Mass Trial

The instant indictment was tried on the theory that there existed a single conspiracy to import and sell cocaine and heroin, having its source in South America and other countries, with its ultimate terminus in New York City, thereupon to be sold in other cities as well. The time frame of the conspiracy was from January, 1968 until April, 1976. *

However, as revealed by the government in its

* Although the indictment dates the beginning of the conspiracy as January 1, 1968, extensive testimony was permitted as to events and transactions occurring as early as the 1950's.

opening statement, its allegations and proof were at substantial variance with its theory, for it clearly alleged that defendants Juan Alvarez and Frank Motel ran their own narcotics organizations (T522), and that two other conspiratorial groups were involved; one supplying heroin, the other supplying cocaine (T524).

The principal evidence at trial, not unexpectedly, consisted primarily of the testimony of coconspirator Jack Brown and codefendant Michael Parker, Brown's son-in-law.

Brown, a long-term narcotics user and seller with a criminal record for narcotics offenses dating back to the 1940's, demonstrated that his role in the conspiratorial network was that of a core conspirator who had various dealings, either buying or selling narcotics, with virtually every defendant charged.

Post-Trial

As a result of the trial, the jury acquitted certain defendants and convicted most other defendants, including Wilson. Certain irregularities regarding the jury process are the subject of a pending motion for new trial, and therefore need not be raised yet on this appeal. Judge Owen subsequently imposed sentences ranging from 25 years imprisonment in some cases to far less in others. Wilson received the third most lenient sentencing, bearing further witness to his tangential, peripheral in the entire enterprise.

Summary of the Argument

The government's indictment of Wilson, a minor peripheral character, along with 32 other defendants let to a mass trial in which Wilson was tainted by prejudicial spillover. The District Court's refusal to sever Wilson from the trial of other defendants was the proximate cause of the prejudice to Wilson. Such prejudice was not cured by limiting instructions.

The District Court's refusal to permit introduction of evidence bearing on the psychiatric background of the chief witness for the government deprived Wilson of an important trial tool and constituted an abuse of discretion.

The deprivation of Wilson's right to introduce such psychiatric evidence was compounded by the District Court's failure to permit the expenditure funds under the Criminal Justice Act for the hiring of psychiatric experts to aid in the development of psychiatric analysis of the primary prosecution witness. The District Court's denial of such funds deprived Wilson, an indigent, of equal protection of the laws.

Argument

POINT I

THE GOVERNMENT'S MASS TRIAL OF TWENTY-TWO DEFENDANTS CREATED SUCH SPILLOVER PREJUDICE AS TO TESTIMONY WITH WHICH WILSON WAS NOT CONNECTED AS TO DENY WILSON DUE PROCESS

The government's insistence upon indicting thirty-three defendants, of whom twenty-two were forced to trial in one massive proceeding, lasting 13 weeks and covering some 9,500 pages in the record, denied Wilson due process where vast amounts of testimony and evidence were admitted limited to individual defendants and where Wilson was forced to sit through weeks at trial where his alleged involvement was not mentioned at all.

This Court has recently considered the results of the governments' insistent penchant for utilizing the mass trial format in cases such as this, where a far-flung and loosely-connected series of defendants are charged over a lengthy period of time and vast geographic area.

In what has now become an oft-cited trilogy of cases regarding the problems of mass conspiracy trials, this Court has repeatedly cautioned the government that, irrespective of whether the conspiratorial format is deemed single or multiple in nature, where the vast and diffuse nature of the defendants and transactions charged lend themselves more

appropriately to subdivision of the defendants and acts into smaller and more manageable subgroups, it was incumbent upon the government and the District Court, in the exercise of its supervisory power, in the interests both of due process and efficient judicial administration, to avoid at all costs the inherent difficulties engendered, and the almost inevitable spillover prejudice that is created, by trying vast numbers of loosely-connected defendants in one trial, United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Miley, 513 F.2d 1191 (2d Cir. 1974); United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

In United States v. Sperling, supra, two groups of co-conspirators were involved: Sperling and his confederates distributing heroin; Parelli and his confederates distributing cocaine. While finding the nexus between the two groups agreeably sufficient to furnish grounds for a single trial, this Court set forth strong views concerning the government's mass conspiracy format:

In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court, . . . we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously

impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants." (Emphasis supplied).

Indeed, in the instant case, the Court's admonition was all the more compelling where, as in Sperling, there was but one coconspirator common to the various groups, the ubiquitous Jack Brown, the one common thread who dealt with the Florida group, the Chicago Group, the Washingtonians, as well as the various individual purchasers and sellers in New York who had little or no direct contact with the other purchasers and sellers from around the country.

Similarly, United States v. Miley, *supra*, repeated Sperling's warnings that the mass conspiracy format was "ill-advised" and invited reversals. Id., 513 F. 2d at 1207 n. 10, 1210.*

* United States v. LaVecchia, 513 F. 2d 1210 (2d Cir. 1975) also remonstrated with the Government for the problems created by such mass conspiracy trials.

There, the convictions were not overtunred only because, unlike the instant case, the trial was short, the defendants few, and no testimony as to any particular defendant differed substantially from that of any others. Id., 513 F. 2d at 1209.

Finally, in United States v. Bertolotti, 529 F. 2d 149 (2d Cir. 1975), this Court ceased its hortatory warning, and simply reversed, finding that the single conspiracy alleged by the government was, despite the common group, really several discreet conspiracies. The Court found further that each defendant had been "subjected... to voluminous testimony related to unconnected crimes in which he took no part" (529 F. 2d at 157). Moreover, additional prejudice was found from the "obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics" which, although probative of one conspiracy, had no relevance to the other transactions proved at trial (529 F. 2d at 158).

This Court has admonished the government with ever-increasing frequency that its desire to indict and try a multiplicity of defendants is not merely administratively undesirable, creating unwarranted burdens at both trial and appellate levels, but raises substantial questions of prejudice to defendants' substantive and procedural rights.

In examining the propriety of such mass conspiracy trials, this Court has shown that it was exercising much greater scrutiny of the actual extent and nature of contacts, and transactions among alleged coconspirators, in order to determine

whether evidence was genuinely sufficient to warrant the single conspiracy format, whether the ties among members of the group are stronger than those between different segments, and whether the witnesses on the different segments are common. Moreover, the Court has demonstrated a willingness to reject the single conspiracy argument even where there are links at the top or some other common core.

Most importantly, in this mass trial format, where the danger of spillover prejudice among multiple defendants is particularly acute, irrespective of whether the trial be denominated simple or multiple conspiracy, among the relevant considerations warranting reversal are the size of the case (Sperling suggested problems with a twelve defendant case and a 4,000 page record); whether the individuals and/or trial followed the Sperling warning (Bertolotti); whether the testimony includes "shocking and inflammatory" material (Bertolotti); and whether the Government at any time viewed the individual segments as different conspiracies (Bertolotti).

Thus, as this Court has enunciated in United States v. Bertolotti, supra, among the factors to be verified in evaluating the prejudicial impact of such a mass trial format are as follows:

1. The number of defendants and coconspirators involved;
2. The length of the trial;
3. The extent of illegal activities of others not on trial;
4. The introduction of inflammatory or shocking testimony with respect to which a particular defendant is not connected.

In the instant case, the government saw fit to join 33 defendants and to name at least 17 coconspirators in its bill of particulars. This Court reversed a similar conviction in Bertolotti which involved 17 trial defendants and 31 coconspirators. Kotteakos v. United States, 328 U.S. 750 (1946) involved 13 defendants and 4 unindicted coconspirators.

Moreover, this trial was one of the longest narcotics conspiracy trials in the Southern District of New York. It consumed 13 weeks of testimony and in excess of 9500 pages of transcript. This Court reversed in Bertolotti, which involved only 2700 pages of transcript and consumed only 4 weeks of trial.

The actual size and length of trial, and the number of defendants, is of critical relevance in determining the guilt or innocence of individuals, who run the substantial likelihood and risk of being condemned for acts committed by other to whom they are totally unrelated.

Besides the obvious impossibility of expecting the jury to particularize the evidence against single individuals where there are fifty or more to keep track of, there is also the substantial danger that, even if capable of particularization, the jury's mood would rapidly turn, after 13 weeks, from specific assessment of the facts to a generalized belief that anyone remotely involved in this trial must surely be guilty.

There is obviously a subliminal effect upon jurors when they are exposed to 13 weeks of testimony concerning cocaine and heroin. Moreover, the prejudicial impact upon the jury

of Jack Brown's testimony concerning his life of violence, guns and obvious paranoia -- matters in which no defendant had any part -- is incalculable. Indeed, as this Court noted in Bertolotti:

The prejudicial effect, however, of requiring the jury to spend two entire days listening to obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics cannot be underestimated. No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed with respect to at least five of the appellants, no such proof was ever convincingly produced. Id., 529 F. 2d at 158.

We think the argument for reversal on the ground that denial of severance prejudiced Wilson as strong as it may possibly be. If any significant amount of evidence of a special character was received against other defendants--and it was--it is hard to imagine what sort of prophylaxis could have protected Wilson against its prejudicial effects. The words of Judge Hays writing in United States v. Branker, 395 F. 2d 881, 888 (2d Cir. 1968), to reverse conviction of four or six defendants after a long multi-party trial are particularly apt:

This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with

dozens of incidents of criminal misconduct which do not involve those defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another." Schaffer v. United States, 362 U.S. 511, 523, 80 S.Ct. 945, 952 (1960) (Douglas, J., dissenting).

We think that that language and the holding of Branker and the teaching of United States v. Kelly, 349 F. 2d 720 (2d Cir. 1965), are heavily in favor of reserving for failure to sever Wilson from this trial, in which he was required to endure the well-known spill-over effect from the trial of the 28 counts in which he was not named, as well as from the trial of co-defendants who were more active in the illegal business.

Judge Friendly in United States v. Miley, *supra*, 513 F.2d at 1209, points out the difficulty in pre-trial resolution of Rule 8 claims:

What has nevertheless given us particular pause is this: In the typical case, when severance motions are made at the beginning of trial, the judge and even the prosecutor may not be certain whether the evidence will support a single conspiracy charge. By the time the evidence has been given, however, a good deal of effort has been invested and the district judge is properly reluctant to grant such motions at that time, especially since the jury might moot the question by acquitting. See 8 Moore, *supra*, Par. 8.06[3], at 8-41. Appellate courts are similarly reluctant to overturn convictions for denial of motions for severance absent a showing of serious prejudice. (F. Id. Par. 8.06 [2].

In this case, however, it was demonstrated that serious prejudice was inherent from the outset of this multi-defendant trial. The prosecutors have not, we submit, exercised "the responsibility and good judgment" that would eliminate the prejudice of joint trial "without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or... on appeal ..." (United States v. Branker, supra, 395 F. 2d at 889).

Nor can much stock be put in the limiting instructions used by the District Court supposedly to lessen the prejudicial impact on Wilson of evidence received against other defendants. As Justice Jackson said in Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concerning opinion): "The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction." The limiting instruction, according to Learned Hand, is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F. 2d 1006, 1007 (2d Cir. 1932). "The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such [evidence] should not tell." Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting), quoted with approval in Bruton v. United States, 391 U.S. 123, 129 (1968).

POINT II

THE COURT'S ADVANCE RULING ON A TENDER OF PSYCHIATRIC EVIDENCE WAS AN ABUSE OF DISCRETION

As part of the 3500 material on Jack Brown, the government turned over Exhibit 3505W--a handwritten letter made by the witness Jack Brown--for identification. On reading this document, defense counsel retained Harvey Roy Greenberg, a psychiatrist, to make an analysis of the letter for the purposes of determining whether it would be of benefit to the defense.

Dr. Greenberg prepared a letter which was submitted to the Court for the purpose of obtaining authorization for further funds for CJA counsel to impeach by extrinsic evidence the testimony of Brown. (T4009) The Court took the matter under advisement (T4011) with the government opposing. Ultimately, the Court not only declined to authorize the funds, but also ruled, in essence, that the Court would not permit the evidence even if it was fully developed.

(T4050-4054) The letter was marked as Court's Exhibit 6.

Relying on this anticipatory ruling, no counsel proceeded to call psychiatric witnesses as to the credibility of Jack Brown.

It is apparent that the outcome of this trial depended to a great extent upon the testimony of one man,

Jack T. Brown. His credibility was the major issue upon which the jury had to pass. The opinion of the jury, formed upon their evaluation of all the evidence laid before them, was the decisive question, as it is on all questions of fact. See United States v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950). It is now even more clear than it was when Hiss, supra, was decided that the existence of insanity or mental derangement is admissible for the purposes of discrediting a witness, particularly since that testimony in this case was not being offered for competency but on credibility directly. See Hanger v. United States, 398 F.2d 91 (8th Cir. 1968). Any testimony which aids in the jury's determination of party's credibility and veracity is relevant. Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975). Even courts which have declined to permit such testimony have recognized its relevance. See United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), United States v. Pacelli, 531 F.2d 135 (2d Cir. 1975); see also Comment, "Psychiatric Evaluation of the Mentally Abnormal Witness" 59 Yale L.J. 1324 (1949); Weihoffen, "Testimonial Competency and Credibility," 34 Geo. Wash.L.Rev. 53 (1968); Juviler, "Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach," 48 Calif.L.Rev. 648 (1960); Slovenko, "Witnesses, Psychiatry and Credibility

Testimony," 19 U.of Fla.L.Rev. 1 (1966); "Mental Examination of Witnesses," 11 Syr.L.Rev. 149 (1960).

In the past the rationale for excluding this testimony has been that it will engender confusion rather than enlightenment and that it creates collateral issues which seem to take the issue of credibility out of the hands of the jury and places it squarely in the hands of an expert. See Fed.R.Evid. 403.

The government, in fact, relied on United States v. Pacelli, supra, 531 F.2d 135, in its argument against permitting either further expenditures of money or admitting the evidence, or both. A close reading of 3505W for identification and Court's Exhibit 6 shows that Pacelli and the other cases seeming to hold against the appellant's point of view are inapposite.

Traditionally, extrinsic psychiatric testimony as to credibility has been offered to demonstrate a character trait which makes it unlikely that the witness would be telling the truth. See, e.g., United States v. Partin, 493 F.2d 750 (5th Cir. 1974); United States v. Barnard, 490 F.2d 907 (9th Cir. 1973). But here the extrinsic evidence was being offered as the offer of proof made by counsel (T4050) to show that the witness had a motive to lie. The preliminary evaluation given by Dr. Greenberg, admittedly on relatively little evidence, is that the witness was "paranoid." Whether

that paranoia was organic, caused by the witness's admitted cocaine abuse over many years, or otherwise based is not material or germane. Counsel intended to argue and did argue to the Court in support of the application that the paranoia of this witness when he surrendered to the Federal Bureau of Investigation forced him, as a defense mechanism against his perceived physical jeopardy from laser lights and ovens which would dispose of his body, to concoct an inculpatory story which would put everyone who menaced him, in his delusions, behind bars where they could not reach him.*

Extrinsic evidence as to motive to lie is clearly of high probative value and generally permissible. United States v. Mallah, 503 F.2d 971, 976 (2d Cir. 1974). The extrinsic evidence offered here was of a condition recognized almost universally by the commentators as the most misleading to the layman and the most needful of psychiatric explanation. Such psychiatric explanation was necessary so that the lay jury--the ultimate lie detector--may properly evaluate the witness's state of mind in reaching a determination as to his truthfulness.

It is true that where the probative value of evidence is low and the chance of confusion and misleading

* At one time Jack Brown told the FBI that he was going to eliminate all the defendants. (T2235)

testimony is high, extrinsic evidence is excludable pursuant to Rule 403 of Federal Rules of Evidence. See United States v. Bowe, 360 F.2d 1 (2d Cir. 1966). However, the evidence sought to be introduced here is in fact highly probative. As Judge Weinstein has said:

At other times, however, evidence of drug usage may be relevant to something other than mental capacity. Evidence of drug involvement is, for instance, often relevant to the issue of bias as indicating why a witness is cooperating with the government and in such cases probative value may be sufficiently high to off-set the danger of prejudice.

3 Weinstein's Evidence ¶607[04] at p. 607-40 (1976)

Particularly in the area of analysis of the lengthy testimony of a paranoid, the probative value of the kind of extrinsic evidence tendered here is higher than usual.

Of all the psychotics, the most misleading to the layman is the paranoic, who entertains delusions of persecution and grandeur but whose personality may not appear as disturbed as that of other psychotics. No matter how absurd his delusions the paranoic may retain the appearance of normality and react in normal fashion to matters outside his delusional system.

Comment, "Psychiatric Evaluation of the Mentally Abnormal Witness," supra, 59 Yale L.J. at 1327.

It is this intrinsic believability in a cleverly put together delusional system which so militates for the use of psychiatric testimony, if available.

The problem of a paranoid personality offers an illustrative example of the usefulness of psychiatric testimony, especially in civil cases. Paranoids, who have a marked proclivity for getting into legal difficulties, often make a favorable appearance in court when not crossed or agitated, and they may impress the untrained observer as rational and sincere. They could conceivably mislead a judge, an attorney or a jury, into the sincerity of their claim, but they would less likely deceive a clinically experienced psychiatrist. [Emphasis supplied]

Banay, "The Psychiatrist in Court in Crime, Law and Corrections," at 433, cited by Slovenko, "Witnesses, Psychiatry and Credibility Testimony", supra, 19 U. of Fla.L.Rev. at 14.

Even the mere explanation of the theory of paranoia by a psychiatrist witness would be helpful beyond measure to a jury trying to evaluate the testimony of a clever paranoid like the witness, Jack T. Brown. Of course, no psychiatric witness would merely take the stand and make such an explanation without the factual foundation found initially in the letter, and which would hopefully have been in the rest of the examination which had been requested.

The Court made its determination as to the non-admissibility of such testimony based on scanty evidence and on what was apparently more than a marginal dislike of some of the theories involved in psychiatric analysis. Such a

mechanical approach to new questions is not a proper exercise of discretion and has been discouraged by this Court. See United States v. Schwartz, 500 F.2d 1350, 1352 (2d Cir. 1974); United States v. Brown, 470 F.2d 285 (2d Cir. 1972).

The mere fact that this area of extrinsic evidence as to credibility is new in development is of little significance in any attempt to justify the Court's precipitous and hurtful ruling.

The entire history of the law of evidence has been marked by a continuous search and more rational rules first as to the competency of witnesses and then as to the admissibility of evidence.

Robertson v. Hackensack Trust Co., 1 N.J. 304, 317, 63 A.2d 515, 521 (1949) (Vanderbilt, C.J. concurring).

Professor Wigmore says that:

As the science of psychology progresses, broadening its scope and enlarging its discoveries of precise truths and methods, it will make copious contributions in this particular field of knowledge. Judicial practice should liberally make use of such methods. All that should be required as a condition is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications...

The distinction between extrinsic testimony and cross-examination here has no significance. The usual objection to proof by extrinsic testimony should not be allowed to put any obstacle in the way of using expert testimony from psychologists....

Wigmore on Evidence, §990.

The Court did, in fact, not have an open mind as to development of this extrinsic evidence, and foreclosed the possibility of its use in a way which was an abuse of its discretion.

POINT III

THE COURT'S REFUSAL TO AUTHORIZE CJA FUNDS FOR PSYCHIATRIC PURPOSES DENIED WILSON EQUAL PROTECTION OF THE LAWS.

In this trial fourteen defendants were indigents represented by counsel assigned under the Criminal Justice Act. They were not only without funds, but were also engaged in a lengthy trial which prevented them from working or otherwise providing funds for their own defense.

Courts can take judicial notice of the fact that physicians in general and psychiatrists in particular are notoriously unwilling to commit themselves to lengthy expenditures of time without a guarantee of payment. No court would expect counsel to guarantee to pay out of his own pocket, no matter how worthy the cause.

After having received authorization to obtain the initial letter analysis, counsel presented the analysis to the Court. Admittedly it was sparse, but counsel stated to the Court that it wished two further steps in order to prepare for the extrinsic psychiatric testimony to be proffered. See Point II supra. First, counsel requested that funds be authorized for an analysis of the transcript of the witness's testimony. The witness was on the stand

for two weeks, a rather lengthy business. Secondly, if the situation warranted, counsel requested an examination of the witness himself.

Such an approach was the most reasonable way for counsel to proceed. No experienced trial lawyer would put an expert witness on the stand with only the material of 3505W for identification as ammunition for analysis. Any such expert would be destroyed by competent trial counsel whose first two questions would probably be: "have you ever examined or seen the witness?" and "Do you know what, if anything, this witness said in this courtroom?"

From the Exhibits themselves, there was a prima facie showing as to the witness's state of mind at the time he surrendered himself. The Court said, "I will recognize that it is certainly arguable that in the days immediately preceding April, 1975, Jack Brown was in rough shape, no question about that is certainly arguable on this."

(T4050-4051). That recognition requires the Court to further recognize the obligations of counsel in a different case, and in turn authorize the use of funds to develop to the fullest that prima facie showing. Then, if the expert finds appropriately, a full dress development of the theory may be made to the jury in defense of the indigent. At least a formal offer of proof can then be made.

The Criminal Justice Act of 1964, as amended,

provides that

Counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense of his case may request them in an ex parte application. Upon finding after appropriate inquiry in an ex parte proceeding, that the services are necessary... the court ...shall authorize counsel to obtain the services.

18 U.S.C. §3006A(e) (1).-

This Court has already recognized that a common concern for fairness at the trial of a criminal offense commands a liberal approach to these kind of applications. United States v. Durant, Docket No. 76-1198 (2d Cir. November 24, 1976). In Durant, this Court relied on United States v. Schultz, 431 F.2d 907 (8th Cir. 1970) (Wisdom, J. concurring), both of which involve denial of funds for psychiatric testimony, citing United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1975).*

This Court seems to adopt a test that where the statute requires the District Judge to authorize defense services, he must do so when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them. Although the evidentiary issues involved in presentation of this point are complex, only

* All three cases--Schultz, Theriault and Bass--involved competency of defendants.

upon a full explication and offer of proof with a psychiatric witness on the stand, could the court have made an adequate determination as to the balance between the probative value of the evidence and the evils decried by Rule 403 of the Federal Rules of Evidence.

The Court's failure to permit such development denies these poor defendants the right which would have been accorded any defendant having the funds, which is to deny the right to present fully his claim for a competent evidentiary ruling at the very least. Denial of that right, therefore, requires reversal.

POINT IV

WILSON IS ENTITLED TO WHATEVER RELEVANT RELIEF IS GIVEN TO THE CO-DEFENDANTS ON THEIR APPEALS

Wilson adopts all the arguments on appeal made by the co-defendants insofar as they may benefit Wilson. It needs no citation of authority--other than the most casual nod to common sense--to establish the point that if the relief granted by the Court on those other arguments relates to Wilson, then Wilson should be awarded the same relief.

If authority were called for, we need go no further than Fed.R.App.P. 28(i), which provides that, "[i]n cases involving more than one appellant or appellee... any appellant or appellee may adopt by reference any part of the brief of another."

Conclusion

For the reasons given, this Court should reverse the conviction of defendant-appellant Don Wilson.

Dated: New York, New York
April 13, 1977

Respectfully submitted,

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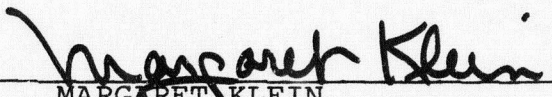
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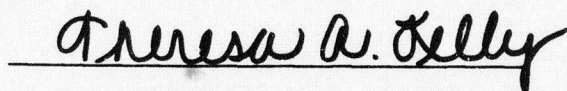
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARGARET KLEIN, being duly sworn, deposes and says:

1. I am over the age of 18 years;
2. I am not a party to this action;
3. On April 13, 1977, I personally caused to be served the annexed Brief of Defendant-Appellant Don Wilson on Daniel Beller, Esq., Assistant United States Attorney, United States Attorney Office, 1 St. Andrews Plaza, New York, New York, by mailing two true copies thereof, postage prepaid.


MARGARET KLEIN

Sworn to before me this
13th day of April, 1977



THERESA A. KELLY
Notary Public, State of New York
No. 4517107
Qualified in Rockland County
Certificate filed in New York County
Commission Expires March 30, 1978

